91-1942
No.

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

HOZELOCK, LTD.,

Petitioner,

v.

ALAN RAY COX,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a North Carolina court violate the due process clause when it asserts jurisdiction over an English manufacturer solely on the ground that the manufacturer intentionally put its products into the American stream of commerce, without restriction, and one of the products was swept into and caused a personal injury in North Carolina.

In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), this Court stated that

> if the sale of a product of a manufacturer or distributor...is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum

> state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.

444 U.S. at 297-8. In Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102 (1987), this Court discussed, but could not decide, whether a state court's exercise of jurisdiction was proper where "the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum state, but the defendant did nothing else to purposefully avail itself of the market in the forum state." 480 U.S. at 110.

Since World-Wide Volkswagen, and as noted in Asahi, see 480 U.S. at 110-112 & 117 n. 1, the circuit courts and numerous state courts have rendered opinions on the

"stream of commerce" issue, and those opinions are in sharp conflict.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

HOZELOCK, LTD., Petitioner

v.

ALAN RAY COX, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Hozelock, Ltd., petitions this Court for a writ of certiorari to the North Carolina Supreme Court to review the order dated March 13, 1992, and the decision of the North Carolina Court of Appeals filed January 7, 1992.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 105 N.C.App. 52, 411 S.E.2d 640, and is reprinted in the appendix, p. 1a.

The order of the North Carolina Supreme Court dismissing petitioner's appeal for lack of substantial constitutional question and denying petitioner's petition for discretionary review is reported at 331 N.C. 116, 414 S.E.2d 752, and is reprinted in the appendix, p. 20a.

The order of the Forsyth County Superior Court denying petitioner's motion to dismiss for lack of personal jurisdiction is unreported, but is reprinted in the appendix, p. 22a.

JURISDICTION

The Forsyth County Superior Court entered its order denying petitioner's motion to dismiss for lack of personal jurisdiction on December 26, 1990. Petitioner appealed to the North Carolina Court of Appeals, as allowed by N.C.G.S. § 1-277(b), see appendix, p. 34a. The Court of Appeals affirmed the trial court's ruling in an opinion filed on January 7, 1992. Petitioner then appealed to and petitioned for discretionary review by the North Carolina Supreme Court, see N.C.G.S. §§ 7A-30(1) & 7A-31, appendix, p. 35a. The Supreme Court dismissed the appeal and denied the petition in an order dated March 13, 1992.

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of

the North Carolina Court of Appeals and the order of the North Carolina Supreme Court. See Shaffer v. Heitner, 433 U.S. 186, 195 n. 12 (1977).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment XIV, United States Constitution: "nor shall any state deprive any person of life, liberty, or property, without due process of law...."

2. North Carolina General Statute § 1-75.4(4)b, reprinted in the appendix, p. 33a.

STATEMENT OF THE CASE

Petitioner Hozelock, Ltd., is an English company that designs and manufactures lawn and garden equipment. Its

offices and manufacturing facilities are in England.

One of Hozelock's products is a hand-held pressurized water sprayer called the Polyspray. Hozelock makes about 300,000 Polysprays each year and sells them throughout the world.

During the period 1985-1987, Hozelock sold about 32,100 Polysprays and replacement parts to two Pennsylvania distributors. In each year after 1986, one of those distributors sold about three dozen of the sprayers to a garden supply store in North Carolina. The supply store sold some of the sprayers to respondent Alan Cox's employer, and Cox used the sprayer at work in North Carolina. In February 1987, the sprayer allegedly malfunctioned while Cox was cleaning it, and a part of

the sprayer struck Cox in the eye with such force that the eye had to be removed.

Cox commenced this action in February 1990 in the Forsyth County Superior Court. Hozelock removed the action to the United States District Court for the Middle District of North Carolina and filed motions to dismiss and an answer. One of the motions was to dismiss for lack of personal jurisdiction. Rule 12(b)(2), Fed.R.Civ.P. In July 1990, on the parties' motion, the district court remanded the action.

Hozelock then brought its personal jurisdiction motion on for hearing in the Forsyth County Superior Court. It presented evidence that it had no "presence" in North Carolina. That is, it had no office or other facility there; it did not own property of any type, did not

have a bank account, and was not registered to do business in the state; and it had not done business in and had never sent employees or agents into North Carolina. Hozelock also presented evidence that it did not own an interest in, share in the revenue of, or control the sales of its American buyers. Title to its goods passed to the buyers at payment. And it did not advertise or market its products in the United States.

The trial court denied Hozelock's motion. It held that the applicable North Carolina jurisdictional statute, N.C.G.S. § 1-75.4(4)b, was satisfied and that the due process clause was not violated because "[b]y purposely injecting its product into the stream of national commerce without any indication that it desired to limit the area of distribution

of its product so as to exclude North Carolina, the defendant purposely availed itself of the privilege of conducting activities within the forum State." Infra, p. 30a, ¶ 10.

The North Carolina Court of Appeals affirmed the trial court's ruling: "We hold the sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant." Infra, p. 18a.

Hozelock appealed to and petitioned for discretionary review by the North Carolina Supreme Court, but that court dismissed the appeal, as not involving a substantial constitution issue, and denied the petition.

ARGUMENT

The circuit and state courts are in conflict over the issue of whether a state violates the due process clause when it exercises personal jurisdiction solely on the ground that the defendant intentionally placed its product into the stream of commerce, knowing that the product could or would be swept into the forum state. The decisions turn on this Court's statement about the stream of commerce in World-Wide Volkswagen Corp. v. Woodson, *444 U.S. 286, 297-8 (1980). The stream of commerce issue presents an important question of federal law which has not been, but should be, settled by this Court.*

In World-Wide Volkswagen, this Court held that Oklahoma could not exercise

jurisdiction over a New York car dealer and a New York distributor whose only connection with Oklahoma was that they had sold a car that happened to suffer an accident while passing through the state. This Court suggested, however, that the result would be different if the accident arose "from the efforts of the manufacturer...to serve, directly or indirectly, the market for its product in other states....The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. Compare Gray v American Radiator & Standard Sanitary Corp., 22 Il12d 432, 176 NE2d 761 (1961)." 44 U.S. at 297-8.

Gray is considered the seminal stream of commerce case. There, one of the defendants was an Ohio valve manufacturer. It sold one of its valves in Ohio to another business which incorporated the valve into a water heater in Pennsylvania and then sold the finished product to the plaintiff in Illinois. The valve allegedly malfunctioned and caused an injury to plaintiff. The plaintiff filed suit in Illinois, and the Ohio valve manufacturer moved to dismiss for lack of personal jurisdiction on the ground that it had no contact with Illinois. The Illinois Supreme Court held that an Illinois court had jurisdiction over the Ohio defendant because a manufacturer could reasonably be expected to defend an action arising out of a defect in one of its products when it was being used in the

ordinary course of commerce. The court assumed, since the defendant did not assert otherwise, that the defendant's valves regularly made their way into Illinois as a result of the defendant's normal commercial transactions.[1]

After this Court's decision in World-Wide Volkswagen, lower courts split over the issue of whether personal jurisdiction could be based entirely on a defendant's placing its products in the stream of commerce with the knowledge or hope that they would be swept into the forum state. For instance, the Seventh Circuit held in Nelson v. Park Industries, Inc., 717 F.2d

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[1] Accord Volkswagenwerk, A.G. v. Klippan, 611 P.2d 498 (Ak. 1980); Alliance Clothing Ltd. v. District Court, 187 Col. 400, 532 P.2d 351 (1975); Anderson v. National Presto Industries, Inc., 257 Iowa 911, 135 N.W.2d 639 (1965); contra O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 194 A.2d 568 (1963).

1120 (7th Cir. 1983), cert. den., 465 U.S. 1024 (1984), that a district court in Wisconsin had jurisdiction over a Hong Kong manufacturer where the manufacturer sold its flannel shirts to a Hong Kong distributor, who sold them to F.W. Woolworth Company in the United States, and one of the shirts was bought by the plaintiff in Wisconsin and allegedly contributed to her injuries in a fire. Accord Bean Dredging Corp. v. Dredge Technology Corp., 744 F.2d 1081 (5th Cir. 1984); Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982). While, on the other hand, the Eighth Circuit held in Humble v. Toyota Motor Co., 727 F.2d 709 (8th Cir. 1984), that an Iowa district court could not assert jurisdiction over a Japanese manufacturer (Arakawa) where the manufacturer sold its automobile seats to

Toyota in Japan, Toyota sold the finished cars to a distributor in the United States, one of the cars was sold to the plaintiff in Iowa as part of Toyota's distribution system, and the car's seats allegedly caused plaintiff's injury in an accident. Accord Brand v. Menlove Dodge, 796 F.2d 1070 (9th Cir. 1986); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290 (3d Cir.), cert. den., 474 U.S. 980 (1985); Hutson v. Fehr Brothers, Inc., 584 F.2d 833 (8th Cir.), cert. den., 439 U.S. 983 (1978). The other significant federal decisions after World-Wide Volkswagen are collected in Justice Brennan's opinion in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 117 n. 1 (1987).[2]

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[2] Representative state decisions are Rostad v. On-Deck, Inc., 372 N.W.2d 717 (Mn. 1985) (finding jurisdiction), and Visarraga v. Gates Rubber Co., 104 N.M. 143, 717 P.2d 596 (Ct.App. 1986) (finding no jurisdiction).

This Court tried to, but could not, settle the stream of commerce issue in Asahi Metal. There, a California resident, who had been injured in California when a tire on his motorcycle exploded, sued the Taiwanese tire manufacturer, who, in turn, crossclaimed against the Japanese company that had made the tire valve assembly. After the plaintiff settled his claims, the Japanese manufacturer moved to dismiss the cross-claim for lack of personal jurisdiction. The California Supreme Court held ultimately that jurisdiction could properly be based on the Japanese manufacturer's awareness that its valves would be sold in California. This Court reversed on the ground that, regardless of whether the Japanese defendant had purposefully engaged in forum activities, it was unfair

to subject it to the jurisdiction of the California courts under the particular facts of the case.

This Court split 4-4-1 on the stream of commerce issue. Justices O'Connor, Powell, and Scalia and Chief Justice Rehnquist believed that

> [t]he 'substantial connection,' Burger King, 471 US, at 475..., between the defendant and the forum State necessary for a finding of minimum contacts must come about by an *action of the defendant purposefully directed toward the forum State*....The placement of a product into the stream of commerce,without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's

> awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

480 U.S. at 112. Justices Brennan, White, Marshall, and Blackmun disagreed:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional

> conduct directed toward that State.

480 U.S. at 117. Justice Stevens believed it was unnecessary to formulate a test and did not join in either holding. 480 U.S. at 121-2.

Since the Asahi decision, the circuit and state courts have continued to render conflicting decisions on the stream of commerce issue. Two circuit courts have held that due process requires something more than the defendant's intentional placement of its product into the stream of commerce. Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc., 950 F.2d 526 (8th Cir. 1991); Federal Insurance Co. v. Lake Shore, Inc., 886 F.2d 654 (4th Cir. 1989). Two circuit courts have issued more liberal decisions, which arguably can be explained as turning on the defendant's specific acts aimed at the forum state,

but which nevertheless suggest an acceptance of the stream of commerce rule. Gulf Consolidated Services, Inc. v. Corinth Pipeworks, 898 F.2d 1071 (5th Cir.), cert. den., _____ U.S. _____, 111 S.Ct. 256, 112 L.Ed.2d 214 (1991); Benitez-Allende v. Alcan Aluminio, 857 F.2d 26 (1st Cir. 1988), cert. den., 489 U.S. 1018 (1989). See also Morris v. SSE, Inc., 843 F.2d 489 (11th Cir. 1988); Mason v. F. Lli Luigi & Franco Dal Maschio, 832 F.2d 383 (7th Cir. 1987).

State court decisions are also in conflict. For example, in Parry v. Ernst Home Center Corp., 779 P.2d 659 (Utah 1989) (citing numerous stream of commerce cases), the Utah Supreme Court held that Utah had no jurisdiction over a Japanese manufacturer whose maul had allegedly caused a personal injury to a Utah

resident in Utah. The defendant manufacturer sold the maul to a Japanese distributor for export to the United States, and the maul eventually made its way through the distribution chain, to a retailer, and into the plaintiff's hands. The court held that jurisdiction could not be based entirely on the defendant's knowledge that one of its mauls might be used in Utah; there had to be some additional conduct by the defendant, and there was none.[3] That decision is wholly at odds with the decisions of the Illinois Supreme Court in Gray, the North Carolina

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[3] Accord Hapner v. Solis Apparatus Manufactories, Ltd., 428 Mich. 659, 411 N.W.2d 439 (1987); Halderman v. Sanderson Forklifts Co., 818 S.W.2d 270 (Ky.Ct.App. 1991); Johnson v. Peacock Lumber Co., 95 Or.App. 710, 770 P.2d 960 (1989); Olmsted County v. Trailer Equipment Warehouses, Inc., 421 N.W.2d 395 (Mn.Ct.App. 1988).

Court of Appeals in this case, and several other courts.[4]

And, needless to say, the commentators cannot agree on how the stream of commerce should affect a state's assertion of personal jurisdiction. See, e.g., P. Stephens, "Sovereignty and Personal Jurisdiction Doctrine: Up The Stream of Commerce Without A Paddle," 19 Fla.St.L.J. 105 (1991); M. Murphy, "Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach," 77 Ky.L.J. 243 (1988-89).

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[4] See e.g., Lebel v. Everglades Marina, Inc., 115 N.J. 317, 558 A.2d 1252 (N.J. 1989); McBead Drilling Co. v. Kremco, Ltd., 509 So.2d 429 (La. 1987); Chace v. Dorcy International, Inc., 68 Ohio App.3d 99, 587 N.E.2d 442 (1991); Heins v. Wilhelm Loh Wetzlar Optical Machinery Co., 26 Mass. App.Ct. 14, 522 N.E.2d 989, cert. den., 402 Mass. 1105, 525 N.E.2d 678 (1988).

The stream of commerce issue presents an important question of federal law that needs to be settled: how should the due process clause be applied to the modern commercial chain that often involves multiple out-of-state and foreign manufacturers and distributors. Manufacturers sell their products to other manufacturers or distributors. Distributors sell to other distributors, retailers, or consumers. The manufacturers and distributors often do not control the markets beneath them in the chain, and they have no "presence" in most of the states into which their products travel. Still, many in the chain know where the products are being sold, and everyone either knows or hopes that the products will be sold in every state in the nation.

Thus, it is fair to assume that in today's business world products of a manufacturer like Hozelock will be swept into every state by the stream of commerce. Does that mean a manufacturer is subject to suit wherever its products travel in the ordinary course of the distribution chain? Or must the manufacturer take some specific step by which it targets the forum state before it is subject to suit there? See, e.g., Benitez-Allende, 857 F.2d 26 (manufacturer of pressure cookers specifically targeted Puerto Rico residents); and Mason, 832 F.2d 383 (manufacturer designed machine for plaintiff's employer).

This issue arises regularly in products liability actions filed in every state and federal district court. But at present the out-of-state or foreign manu-

facturers and distributors encounter conflicting rules when they move to dismiss for lack of personal jurisdiction and argue they have no contact with the forum. At least the First, Second, Fifth, Sixth, Seventh, and Tenth Circuits and Illinois, North Carolina, and several other states will deny the motions to dismiss solely on the ground that the defendant put its product into the stream of commerce without restriction and with the knowledge or hope that it would or might be sold and used in the forum state. The Third, Fourth, Eighth, Ninth, and Eleventh Circuits and Utah and other states will probably grant the motion unless there is evidence that the defendant took some specific step directed at the forum.

In World-Wide Volkswagen, this Court said that the due process clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 444 U.S. at 297. But that is not yet true for the business defendant whose products are being carried into every state by the stream of commerce.

CONCLUSION

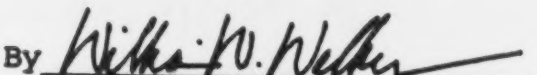
Hozelock believes the stream of commerce issue should be decided as suggested by Justice O'Connor in Asahi Metal; that is, a state should not be able to assert jurisdiction over a person or business unless there is evidence of "*an*

action of the defendant purposefully directed toward the forum State." 480 U.S. at 112. But, beyond Hozelock's specific argument, there is the greater need to resolve this issue that now divides the federal and state courts and which denies predictability to a great many business transactions in our country.

For these reasons, Hozelock asks that this Court issue a writ of certiorari to the North Carolina Supreme Court.

This, the 22nd day of May, 1992.

CRAIGE, BRAWLEY, LIIPFERT & ROSS,
Attorneys for Petitioner

By 

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APPENDIX

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NO. 9121SC195

NORTH CAROLINA COURT OF APPEALS

Filed: 7 January 1992

ALAN RAY COX,
Plaintiff

v.

Forsyth County
No. 90CVS706

HOZELOCK, LTD., a/k/a
Hozelock-ASL and as
Hozelock-ASL, Ltd.,
Defendant

Appeal by defendant from order entered 26 December 1990 by Judge James J. Booker in Forsyth County Superior Court. Heard in the Court of Appeals 2 December 1991.

Defendant is an English company engaged in the design, manufacture, distribution, maintenance and marketing of numerous products including a water pressure sprayer known and designated as "Polyspray" or "Polyspray2." Approximately 300,000 of these sprayers were

manufactured per year during the period 1 January 1985 through 1 January 1988. Of these, approximately 32,100 were sold to two Pennsylvania distributors, Geiger Corporation and True Temper Corporation. Replacement parts for the Polyspray were also sold to Geiger and True Temper during this period.

Defendant was aware that Geiger was a wholesaler which bought goods from manufacturers and resold them to retail stores in the United States. Geiger sold approximately three dozen Polysprays per year since 1986 to Piedmont Garden Supply of Salisbury, North Carolina, which purchased such sprayers for resale in the ordinary course of trade. Plaintiff's employer, A New Leaf, purchased these sprayers from Piedmont Garden Supply as well as directly from Geiger.

On or about 4 February 1987, plaintiff, in his capacity as an employee of A New Leaf, was using a Polysprayer which was manufactured by defendant. He attempted to clear an obstruction in the sprayer when it exploded in his face. Plaintiff's eye was damaged to such an extent that it had to be removed.

Plaintiff commenced this action on 2 February 1990 in Forsyth County Superior Court alleging breach of warranty and negligence. Defendant removed the action to the United States District Court for the Middle District of North Carolina on 28 February 1990. Defendant filed an answer and motion to dismiss, asserting lack of personal jurisdiction over defendant pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure. The action was remanded to Forsyth County

Superior Court which denied defendant's motion to dismiss for lack of personal jurisdiction. From that order defendant now appeals.

Charles O. Peed for plaintiff appellee.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for defendant appellant.

WALKER, Judge

In order to establish personal jurisdiction over a foreign defendant a two part test must be satisfied. First, there must be a North Carolina statute which permits the exercise of personal jurisdiction over defendant. In the instant case the trial court properly exerted jurisdic-

tion over defendant under G.S. 1-75.4(4)b, and defendant conceded this point. The second part of the inquiry addresses whether the exercise of such personal jurisdiction over defendant is consistent with the well ingrained constitutional notions of due process and fairness. It is this question which we consider on appeal.

We begin by noting that the ability of our courts to exercise personal jurisdiction over a foreign defendant was articulated early on by the U. S. Supreme Court in International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945), where the Court held:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "tradi-

> tional notions of fair play and substantial justice."

More recently the Supreme Court's decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L.Ed.2d 490 (1980), is instructive as to when jurisdiction may lawfully be asserted. In World-Wide, plaintiffs were New York residents who purchased an automobile from a retailer in New York. Following an accident involving the automobile in Oklahoma, plaintiffs initiated suit against the New York retailer and New York distributor in Oklahoma state court. The Supreme Court held, however, that such an exercise of personal jurisdiction over the New York defendants was incompatible with the Due Process Clause of the Fourteenth Amendment in light of the fact that the sole connection with the forum state of Oklahoma was that the accident had occurred there.

Though it was arguably foreseeable a product sold elsewhere could reach the forum state, the World-Wide Court noted that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." Id. at 295, 62 L.Ed.2d at 500. The Court clarified this statement, however, by noting:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297, 62 L.Ed.2d at 501. As to when defendant's connection with the forum state would cross that threshold so that it would be consistent with the notions of

due process and fairness to subject the defendant to the personal jurisdiction of the forum state, the Court stated:

> [I]f the sale of a product of a manufacturer or distributor...is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.

Id. at 297-298, 62 L.Ed.2d at 501-502 (emphasis added).

This Court relied on the language of World-Wide in rendering our decision in Bush v. BASF Wyandotte Corp., 64 N.C.App. 41, 306 S.E.2d 562 (1983). In Bush, a

North Carolina plaintiff was injured while operating a washing machine for her employer. The machine had been manufactured by a Swedish corporation which sold several such machines to a distributor in New York. The New York distributor then sold the washing machine to plaintiff's employer. At no time did defendant corporation attempt to limit the area of distribution so as to exclude North Carolina. Upon an analysis of various state court and federal decisions, this Court held:

> [I]n light of the fact that defendant-appellees purposefully injected their product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina, we hold that the courts of North Carolina may lawfully assert personal jurisdiction over defendant-appellees.

Id. at 51, 306 S.E.2d at 568.

We explicitly reaffirmed Bush in the more recent decision of Warzynski v. Empire Comfort Systems, Inc., 102 N.C.App. 222, 401 S.E.2d 801 (1991). In that case, defendant was a Spanish corporation with its principal office in Spain. Defendant manufactured a gas heater which it then sold to an Illinois distributor and conferred upon that distributor the exclusive rights to distribution of its product in the United States. The Illinois distributor had a North Carolina company acting as distributor in North Carolina. The North Carolina distributor thereby sold the heater to a North Carolina retailer who then sold it to plaintiff. Plaintiffs sued after the heater allegedly started a fire in their home. This Court found that insofar as the defendant intentionally injected the product into the

stream of commerce, Bush was the controlling authority and defendant had "subjected itself to the jurisdiction of the courts of this state." Id. at 229, 401 S.E.2d at 805.

We are struck by the factual similarities between Bush, Warzynski, and the case before us. Without question, this defendant purposefully and intentionally placed the product in the stream of interstate commerce. The findings of fact by the trial judge indicated defendant regularly sold its Polyspray and replacement parts to Geiger and True Temper. Further, defendant was fully aware that Geiger was a wholesaler which bought goods from manufacturers such as defendant and resold those goods in the United States. At no time did defendant attempt to limit its area of distribution so as to exclude

North Carolina. These facts therefore indicate defendant knew or reasonably should have known that, due to its relationship with Geiger, its products would be used in states other than Pennsylvania. Otherwise, defendant corporation would not have sold such products to a distributor but to someone with whom the product would remain for use, or would have taken steps to limit the distribution area of the product. Instead, defendant sought to expand its operations so as to reap profits in the U. S. marketplace. As such, defendant availed itself of the laws of these various states. Consistent with the notions of due process and fairness defendant could then reasonably expect to be subject to the jurisdictions of the courts in those states, so that the

exercise of personal jurisdiction over the defendant by one of those states, North Carolina, did not violate the Due Process Clause.

Counsel for defendant stated at oral arguments that proper jurisdiction in this case would be in Pennsylvania, where defendant's goods were introduced into the U. S. marketplace. To recognize this view, however, plaintiffs in this state and elsewhere would be relegated to bringing their actions in Pennsylvania, even if the claim did not arise in Pennsylvania and plaintiffs had no other contacts with that state. Upholding this argument would effectively give defendant limited immunity insofar as the barriers facing plaintiffs, financial or otherwise, would be too great in many cases to warrant pursuing their claims by having to

initiate suit in Pennsylvania. Consequently, Pennsylvania cannot be held to be the exclusive forum.

Defendant would have us rely on Moss v. The City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961), for the proposition that personal jurisdiction cannot be conferred on a foreign defendant solely on the basis the defendant intentionally placed goods in the stream of commerce. In that case, defendant Wood was an Illinois corporation which manufactured a lawn mower in Illinois and sold it to an unrelated distributor in Virginia. The distributor then sold the mower to a business in North Carolina which in turn sold it to the City of Winston-Salem. Plaintiff was injured by the mower while in the employ of the City. Although the facts indicated defendant

Wood had intentionally placed the mower in the stream of interstate commerce, the North Carolina Supreme Court held that defendant Wood "Has not had any contacts in the State of North Carolina that could make it amenable to process from the courts of North Carolina for the purpose of a judgment in personam." Id. at 484, 119 S.E.2d at 448.

We find Moss not to be dispositive to this case. The rationale and decision of Moss is largely premised on a prior case, Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). In Putnam, the North Carolina Supreme Court held personal jurisdiction could not be exercised over a foreign defendant who sold magazines to distributors within this state, but delivered and surrendered title to the magazines to carriers outside North

Carolina. The court enunciated, however, that whether a foreign defendant can be made subject to personal jurisdiction of the forum state is a question of due process "which must be decided in accord with the decisions of the U. S. Supreme Court." Id. at 438, 96 S.E.2d at 450. Thus, it is crucial to note that when Putnam and Moss were decided, the U. S. Supreme Court had not yet rendered the World-Wide decision. The precedential value of both Moss and Putnam, by their own reasoning, must therefore yield to the rationale of World-Wide.

Further, we cannot agree that the impact of World-Wide has been significantly lessened due to the recent Supreme Court decision in Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 94 L.Ed.2d 92 (1987). There plain-

tiff, a non-California resident, sought to maintain a cross-claim against a Japanese manufacturer in California state court. Finding California's own interests to be minimal and that an exercise of personal jurisdiction would pose an undue burden on defendant, the Supreme Court held California's exercise of jurisdiction over Asahi violated the Due Process Clause, was unreasonable and unfair. The Court was evenly split, however, as to the ramifications of World-Wide and whether intentionally placing a product in the stream of commerce, without more, provided a sufficient basis for jurisdiction over a foreign defendant.

Subsequently, we hold World-Wide still to be the controlling point of authority on this question of when a forum state may assert personal jurisdiction

over a foreign defendant. "Asahi does not overrule previous cases that follow the stream of commerce theory, including Bush v. BASF." Warzynski v. Empire Comfort Systems, Inc., 102 N.C. App. 222, 229, 401 S.E.2d 801, 805 (1991). In conformity with the trend of North Carolina case law, we uphold the stream of commerce doctrine and find it consistent with the federal Due Process Clause. We hold the sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant. Pursuant to the facts in this case, the North Carolina court may properly invoke personal jurisdiction over defendant.

Affirmed.

Judges **WELLS** concurs with a separate opinion.

Judge **LEWIS** concurs.

WELLS, Judge, concurring.

I concur with the result reached by the majority with this additional comment. The "stream of commerce" standard set out in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 62 L.Ed.2d 490 (1980) establishes a two-step analysis: (1) whether a foreign defendant has placed or delivered its product into the stream of commerce and (2) with the expectation that the product will be purchased by consumers in the forum state. The acts of the defendant in this case meet both requirements of this standard.

No. 51P92 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ALAN RAY COX	)	
	)	From Forsyth
v	)	(9121SC195)
	)	
HOZELOCK, LTD., a/k/a Hozelock-ASK and as Hozelock-ASL, Ltd.	)	

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiff; and upon consideration of the petition for discretionary review of the decision of the North Carolina Court of Appeals, filed by Defendant pursuant to G.S. 7A-31, the following

order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> Allowed by order of the Court in conference, this the 4th day of March 1992.
>
> s/ Lake, Jr.
> For the Court

The petition for discretionary review is:

> Denied by order of the Court in conference, this the 4th day of March 1992.
>
> s/ Lake, J.
> For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of March 1992.

CHRISTIE SPEIR PRICE
Clerk of Supreme Court

s/ Peggy N. Byrd
Assistant Clerk

NORTH CAROLINA) IN THE GENERAL COURT OF
) JUSTICE
FORSYTH COUNTY) SUPERIOR COURT DIVISION
FILE NO.: 90 CVS 0706

ALAN RAY COX,
PLAINTIFF,

VS.

HOZELOCK, LTD., also known as HOZELOCK-ASL, and as HOZELOCK-ASL, LTD.,
DEFENDANT.

ORDER

This matter coming on to be heard, being heard by the undersigned Judge James J. Booker presiding over the regularly scheduled session of the Forsyth Civil Superior Court on the motion of the Defendant to dismiss for lack of jurisdiction over the person of the Defendant HOZELOCK, LTD., also known as HOZELOCK-ASL, and as HOZELOCK-ASL, LTD. The Court having examined the pleadings

and other matters of record and entertained stipulations of counsel as may be hereinafter set out and having heard the arguments of the parties, now therefore the court makes the following findings of fact and conclusions of law and orders:

FINDINGS OF FACT

The court finds the following facts to be true for the purposes of determining the existence of personal jurisdiction:

1. The Plaintiff has been a resident of Winston-Salem, North Carolina for more than six months next preceding the institution of this action.

2. The Defendant is a corporation of the United Kingdom chartered under the laws of England.

3. Defendant manufactured a product known as the "Polyspray" or "Polyspray 2" House and Garden pressure Sprayer during the period beginning January 1, 1985 and ending January 1, 1988.

4. The Defendant manufactured approximately 300,000 Polysprays in the United Kingdom per year during the period January 1, 1985 to January 1, 1988.

5. The Defendant sold approximately 15,000 Polysprays to E. C. Geiger, Inc., in Harleysville, Pennsylvania, and approximately 17,100 Polysprays to True Temper Corp. in Shiremanstown, Pennsylvania, during the period January 1, 1985 to January 1, 1988.

6. The Defendant is aware that Geiger Corporation is a wholesaler that buys goods from manufacturers such as

Hozelock and resells those goods in the United States.

7. The Defendant has been told that the Geiger Corporation sold the Polyspray to a buyer in North Carolina during the period January 1, 1985 to January 1, 1988.

8. Defendant has sold replacement parts for the Polyspray to the Geiger Corporation and to True Temper Inc. during the period January 1, 1985 to January 1, 1988.

9. At no time has the Defendant tried to control the Geiger Corporation, to whom Defendant sold the Polyspray. Defendant has not attempted to control the True Temper corporation except to the extent that True Temper was at one time obligated to purchase a minimum number of the Defendants' products.

10. Defendant did not attempt to limit the area of distribution of its product so as to exclude the State of North Carolina during the period January 1, 1985 to January 1, 1988.

11. Piedmont Garden Supply Company, located in Salisbury, North Carolina has purchased from distributor Geiger Corporation approximately three dozen Polysprays per year beginning in the year 1986 and continuing up to the present. These Polysprays were purchased for resale in the ordinary course of trade in the State of North Carolina and are readily available to and regularly purchased by individual consumers in the State of North Carolina.

12. The Plaintiff was an employee of "A New Leaf" on February 4, 1987, and was using a Polyspray House and Garden

Pressure Sprayer at the time he was injured.

13. The Polyspray House and Garden Pressure Sprayer that the Plaintiff was using was the property of "A New Leaf" and "A New Leaf" purchased all such sprayers from either Piedmont Garden Supply of Salisbury, North Carolina or from the Geiger Corporation in Harleysville, Pennsylvania.

14. On or about February 4, 1987, the Plaintiff, in his capacity as an employee of "A New Leaf" suffered an injury to his eye.

15. The Plaintiff was using a "Polyspray" House and Garden Pressure Sprayer at the time his eye was injured on February 4, 1987, and such sprayer caused the injury to the Plaintiff's eye.

16. The Polyspray pressure sprayer involved in the Plaintiff's injury was sold by Hozelock in 1986 to the Geiger Corporation in Harleysville, Pennsylvania.

17. The parties have stipulated that there is a sufficiency of process and service of process in this action.

18. The parties have stipulated that this order may be signed out of term and out of session.

CONCLUSIONS OF LAW

1. Personal jurisdiction will be found where a North Carolina statute permits the exercise of jurisdiction over the Defendant and the exercise of that statutory power does not violate the due process clause of the United States Constitution's Fourteenth Amendment.

2. In the case at bar, jurisdiction is asserted pursuant to N.C.G.S. 1-75.4(4)b and such statute is the proper statute for assertion of personal jurisdiction over the Defendant in this action.

3. The Defendant was given proper service of process and such process was sufficient to maintain this action.

5. The foregoing conclusions of law satisfy the statutory requirements for the exercise of jurisdiction over the person of the Defendant.

6. Defendant voluntarily placed its product in the stream of commerce.

7. The constitutional requirements of minimum contacts will be satisfied in all states where the defendant can foresee that the product will be marketed.

8. The Defendant could reasonably foresee that its products would be marketed in the State of North Carolina.

9. The Defendant now has actual knowledge that the product which injured the Plaintiff was being sold by the Geiger corporation, a wholesaler, to a North Carolina buyer during the period January 1, 1985 to January 1, 1988.

10. By purposely injecting its product into the stream of national commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina, the Defendant purposely availed itself of the privilege of conducting activities within the forum State.

11. The Defendant engaged in the requisite purposeful activity notwithstanding the fact that title and control

of its products passed outside the forum state to a wholesaler who eventually resold the product to consumers within the forum state.

12. The exercise of N.C.G.S. 1-75.4(4)b, as applied to the Defendant in this action does not violate the Due Process clause of the United States Constitution.

13. The Defendant is within the personal jurisdiction of the Superior Court of Forsyth County, North Carolina, based on the foregoing findings of fact and conclusions of law.

ORDER

NOW THEREFORE it is ordered that:

1. The motion of the Defendant to dismiss for lack of personal jurisdiction

pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure is hereby denied.

2. The motion of the Defendant to dismiss for insufficiency of service of process pursuant to Rule 12(b)(5) of the North Carolina Rules of Civil Procedure is hereby denied.

This the 26th day of December, 1990.

s/ James J. Booker
Superior Court Judge

The Defendant objects and excepts to the findings of fact and conclusions of law in and entry of this Order.

s/ James J. Booker
Superior Court Judge

§1-75.4(4)b Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:

....

(4) Local Injury; Foreign Act...in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:

....

b. Products, materials or thing processed, serviced or manufactured by the defendant were used

or consumed, within this State in the ordinary course of trade.

§1-277(b) **Appeal from superior or district court judge.**

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

§7A-30(1) Appeals of right from certain decisions of the Court of Appeals.

Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State.

§7A-31. **Discretionary review by the Supreme Court.**

(a) In any cause in which appeal is taken to the Court of Appeals,...the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.

....

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Supreme Court, U.S.
FILED
JUL 10 1992
OFFICE OF THE CLERK

No. 91-1942

In The

Supreme Court of the United States

October Term, 1992

HOZELOCK, LTD.,

Petitioner,

vs.

ALAN RAY COX,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Court of Appeals and North Carolina Supreme Court properly upheld the trial court's determination that it had personal jurisdiction over the petitioner under the stream of commerce theory regardless of which approach is followed?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Cox was injured in February 1987 by a garden water pressure sprayer manufactured by petitioner Hozelock. Petitioner is an English company that designs, manufactures, distributes and maintains hundreds of products including a water pressure sprayer known and designed as "Polyspray or

Polyspray2" (App. 1a-2a).[1] Such products are sold throughout the world, including substantial sales in the United States (App. 1a-2a). Petitioner sold products to three distributors in the United States: the Geiger Corporation, the True Temper Corporation, and Melnor Industries (App. 24a).

Hozelock manufactured approximately 300,000 sprayers per year of the type involved in the respondent's injury. Approximately 32,100 of the type of sprayer involved in the respondent's injury were sold by the petitioner to two Pennsylvania distributors, the Geiger Corporation and the True Temper Corporation (App. 1a-2a). More specifically, the particular sprayer that injured the respondent was one of approximately 15,000 such sprayers made by the petitioner and sold to the Geiger Corporation during the period of January 1, 1985 through January 1, 1988 (App. 24a).

Petitioner Hozelock is aware that the Geiger Corporation is a wholesale distributor who buys goods from Hozelock and resells those goods to retail stores in the United States (App. 24a-25a). The Geiger Corporation regularly sold Polyspray sprayers manufactured by Hozelock to Piedmont Garden Supply, a retail store in Salisbury, North Carolina. They sold approximately three dozen sprayers per year since 1986 to Piedmont Garden Supply. Piedmont Garden Supply purchased such sprayers for resale in the ordinary course of trade (App. 2a).

Hozelock is the only manufacturer of replacement components for the Polyspray2 and regularly sells such parts to the Geiger Corporation and to the True Temper Corporation (App. 25a). Further, Hozelock states in its instruction manual that spare parts may be found at "good hardware stores and garden centres."

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1. Citations to "App. ____" are to the Appendix to the Petition.

(Lodging App. 1a).[2] Petitioner operates a "sales and after-sales service for retailers, . . . providing support and service direct to the end user." Additionally, in the manual, Hozelock personally guarantees its sprayers "against any defect arising from faulty material or workmanship for a period of 12 months from the date of purchase" and adds further that "[t]his guarantee is in addition to and in no way detracts from your statutory rights as a consumer." (Lodging App. 2a).

Petitioner is aware that the Geiger Corporation sold to a buyer in North Caroline (App. 25a). Petitioner has made no attempt to limit the area of distribution of his product so as to exclude the State of Carolina (App. 11a). The product involved in the respondent Cox's injury is readily available to and regularly purchased by individual consumers in the state of North Carolina (App. 26a).

Respondent's employer, "A New Leaf," purchased the sprayer which caused respondent's injury from Piedmont Garden Supply of Salisbury, North Carolina. Respondent's employer had purchased all such sprayers it used prior to respondent's injury from either Piedmont Garden Supply or from the Geiger Corporation directly (App. 26a-27a). In February of 1987, respondent Cox was injured by the Polysprayer manufactured by Hozelock while using the sprayer in his capacity as an employee of A New Leaf. Respondent's eye was damaged to such an extent that it had to be removed (App. 3a).

REASONS FOR DENYING THE WRIT

Petitioner argues that there is a conflict among the state courts and the circuit courts concerning the proper application of the

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2. Copies are reproduced in Respondent's Lodging Appendix which is submitted with this brief under separate cover.

stream of commerce theory. Further, petitioner argues that the conflict should be resolved with this case. However, petitioner disregards the fact that the stream of commerce theory was properly applied in this case and that the trial court's decision upheld by the North Carolina Court of Appeals and Supreme Court is consistent with federal due process. That being the case, there is no issue worthy of review before this Court and the petition for review should be denied.

I.

THE NORTH CAROLINA COURT OF APPEALS AND SUPREME COURT DID NOT DEPART FROM ESTABLISHED PRECEDENT IN UPHOLDING THE TRIAL COURT'S DETERMINATION THAT IT HAD PERSONAL JURISDICTION.

The North Carolina Court of Appeals and Supreme Court correctly held in this case that the exercise of jurisdiction was proper by relying upon the language in the Court's decisions in *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) and the later case of *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102 (1987). In *World-Wide,* the Court stated that a court's exercise of personal jurisdiction over a foreign defendant is consistent with constitutional notions of due process and fairness where the foreign defendant injected his products into the stream of commerce. In *Asahi,* the Court validated the stream of commerce theory and determined the balancing factors that are important to traditional notions of fair play and substantial justice.

In the *World-Wide* case, plaintiffs were New York residents who purchased an Audi automobile from a New York retailer. Following an accident in Oklahoma, plaintiffs sued the New York retailer and the New York wholesaler in an Oklahoma court. The

Court ruled that the Oklahoma courts did not have the power to exercise personal jurisdiction over the defendants where the only connection with the forum state was "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *World-Wide Volkswagen v. Woodson* at 295. The Court made an important distinction in the *World-Wide* case, stating that the consumer's transport of the product to the forum state, by itself, cannot form the basis of personal jurisdiction. *Id.* at 298.

While the Court recognized that it was foreseeable that an automobile sold elsewhere could reach the forum state, the Court noted that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause." *Id.* at 295. The Court was very careful to note that:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297. By way of explaining when a corporation could reasonably anticipate being haled into court in a particular state, the Court went on to say:

> When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen v. Woodson at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235 (1958)).

Finally, the Court described what sort of activities a corporation could engage in that would constitute purposefully availing itself of the privilege of conducting activities within a forum state by saying:

> If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Compare Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E. 761, 444 U.S. 297-298 (1961).

In the case at bar, Hozelock's activities are precisely what the *World-Wide* Court described. Hozelock purposefully availed itself of the privilege of conducting activities in North Carolina by placing its product into the stream of commerce with the reasonable expectation that it would be purchased by consumers in North Carolina. Further, Hozelock sold its sprayers as well as hundreds of other products to three major national distributors in the United States who resell the products to retail stores throughout the United States, including in North Carolina.

Respondent Cox was injured by one of those thousands of products in the state of North Carolina.

Although the *World-Wide* Court defined the stream of commerce theory, it did not apply it in that case. However, the facts of the *World-Wide Volkswagen* case are distinguishable from the case at bar in that the product involved in the *World-Wide* case reached the forum state because the consumer drove the product there after he had purchased it. In the case at bar, the product was purchased in the forum state and reached the forum state through the normal channels of distribution in the ordinary course of trade. Therefore, the stream of commerce theory would apply to these facts.

Petitioner would concede that the language of the *World-Wide* Court presents a strong argument that the stream of commerce theory should be applied to the present facts but argues that the later case of *Asahi Metal Industry Co. v. Superior Court of California* would alter the application of the stream of commerce theory. In *Asahi*, a California resident was injured when he lost control of his motorcycle which contained an allegedly defective valve manufactured by Asahi, a Japanese corporation. The complaint named both Asahi and the tire manufacturer, Cheng Shen, a Taiwan corporation. Cheng Shen cross-complained against Ashahi for indemnification. The injured California resident later settled his claims with the defendants leaving the cross-claim between the two foreign defendants in the California court.

The *Asahi* Court quoted extensively from the *World-Wide Volkswagen v. Woodson* decision and found the stream of commerce theory of minimum contacts to be a valid basis for the exercise of personal jurisdiction. *Asahi Metal Industry v. Superior Court of California*, 480 U.S. 102 at 109-110. The Court noted that there had been a number of cases since the *World-Wide* decision where the petitioner corporation did nothing to

purposely avail itself of the market in the forum state other than to place its product into the stream of commerce. *Asahi* at 110. The Court, however, was evenly split on the question of whether placing a product into the stream of commerce, without more, was a sufficient basis for jurisdiction over a foreign defendant. Absent a majority decision on the issue, *Asahi* does not stand for the proposition that a foreign defendant must do something more than place its product into the stream of commerce in order to subject itself to the jurisdiction of a forum state's courts where its product is sold there and causes an injury.

However, the split in the Court seems to parallel the split in the circuit courts. Four of the justices, led by Justice O'Connor, did believe that some further action of the defendant other than merely placing its product into the stream of commerce was necessary to support jurisdiction by the forum state. They would require some additional conduct on the part of the defendant directed toward the forum state. Although this view is the minority approach to the stream of commerce theory among the federal courts of appeal, as noted by Justice Brennan's opinion in *Asahi*, 480 U.S. at 118, even applying this stricter approach to the case at bar, the Court would find that there was personal jurisdiction in the present case.

Petitioner's name appeared directly on the product and in manuals and pamphlets included with the product. In fact, Hozelock made personal warranties and representations directly to the consumer and provided service direct to the consumer. Further, petitioner was aware that its products were sold in North Carolina in the ordinary course of trade and made no effort to limit the area of distribution of its products. These contacts and others are sufficient to fulfill the requirement that the petitioner must have done more than just place its product into the stream of commerce. Therefore, regardless of whether there is a conflict in the circuit courts or not, this case would be decided the same

under both approaches and it would not be the proper case to settle the alleged conflict within the circuit courts. The petition for review should be denied.

Furthermore, eight of the justices concurred in the holding in *Asahi* that the exercise of personal jurisdiction over Asahi in that case would " 'offend traditional notions of fair play and substantial justice.' " *Asahi* at 113 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). However, the Court did not base its holding on whether or not placing a product in the stream of commerce was a sufficient ground for the forum state to find jurisdiction. Instead, the Court examined the burdens on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. *Id.* The Court also considered "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies." *Asahi* at 113 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980)).

Looking at these factors, the Court found that although the burden on the defendant to defend in a foreign judicial system was substantial, "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* at 114. But in that case, the interests of the plaintiff and the forum were slight. *Id.*

The Court noted that since "the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished." *Id.* The Court also observed that it was not at all clear whether California law should govern a dispute between foreign corporations regarding a transaction made in Japan and a shipment of goods from Japan to Taiwan. *Id.* at 115. The court concluded that the burden on the defendant

outweighed the slight interests of the plaintiff and the forum state and the exercise of personal jurisdiction "in this instance would be unreasonable and unfair." *Id.* at 116.

The case at bar differs from *Asahi* with respect to three decisive points. First, the respondent is a North Carolina resident, whereas in *Asahi*, neither of the litigants were even United States citizens or entities. Second, North Carolina substantive law is applicable, whereas it was not clear in *Asahi* whether California law would even apply to two foreign corporations. Finally, the petitioner is the party who placed its goods into the stream of commerce by selling them to distributors in the United States whereas the transaction and shipment of goods between the parties in *Asahi* occurred completely outside the United States and the manufacturer of the defective part did not place the product into the stream of commerce in the United States. Thus, the factors that led the *Asahi* Court to conclude that the exercise of jurisdiction over the petitioner would be unfair and unreasonable are not present in the case at bar. Indeed, in the case at bar, those same balancing factors weigh in favor of the forum state's exercise of personal jurisdiction over the petitioner.

This Court has already upheld the stream of commerce theory as a valid basis for determining personal jurisdiction over a foreign defendant. Further litigation on a matter which is already decided would be a waste of this Court's valuable time and resources. Although both the consuming public and foreign non-resident businesses are affected in situations such as the case at bar, the potential plaintiffs already realize they may sue manufacturers of products which injure a person when such a product was introduced by the manufacturer into the stream of commerce based on the decisions in *World-Wide Volkswagen* and *Asahi*. Regardless of which approach to the stream of commerce theory is applied in the present case, the court has jurisdiction. Therefore, this case is not a suitable case for this Court to test the stream of commerce theory.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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